IN THE

Supreme Court of the United States

October Term, 1967

No. 616

In the Matter

of

A & S ELECTRIC CORP., Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 22, 1967.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Eastern District of New York, dated November 4, 1966, is recorded in 378 F. 2d — and printed in the appendix to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

1. Whether employer payments to the Annuity Fund of The Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act.

Statement

This case affects the fiscal integrity of all employee benefit Trust Funds which provide for full and immediate vesting to named employees.

Directly concerned is the Annuity Plan of the Electrical Industry, which through the Joint Industry Board of the Electrical Industry filed a claim on behalf of forty of its named employ participants for $5,114 unpaid contributions, claiming priority status as "wages * * * due to workmen" under Section 64a(2) of the Bankruptcy Act, 70 Stat. 725 (1956), 11 U.S.C. Sec. 104a(2).

The Referee in Bankruptcy, the United States District Court for the Eastern District of New York, and the court below, all ruled that the claim must be denied a wage priority under the Supreme Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959).

Embassy Restaurant concerned employer contributions to a Welfare Fund, which were applied to purchase insurance policies to provide medical and other benefits to unidentified employees.

Since the Supreme Court's decision in *Embassy Restaurant*, employers have bargained collectively to contribute, and have contributed, many billions of dollars to Funds which provide workmen with fixed and vested benefits. The Annuity Plan of the Electrical Industry alone has collected more than $100,000,000.

In 1962, the United States Court of Appeals for the Ninth Circuit, in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F. 2d 768, distinguishing *Embassy Restaurant*, granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. Without conceding the validity of the rationale of *Sulmeyer*, and without conceding a conflict, the court below distinguished *Sulmeyer* from the instant case upon grounds which were not discussed by the Supreme Court in *Embassy Restaurant*.

The interest of the United States as respondent arises from the fact that if the claim of the Joint Industry Board is paid, the Federal tax claim will not be paid in full. Very frequently, in fact, bankrupt estates do not contain sufficient funds to satisfy both wage claims and tax claims.

Reasons for Granting the Writ

1. The decision of the court below is substantially in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund*, 301 F. 2d 768. The court below did not concede the conflict. The court below distinguished *Sulmeyer* on the grounds that:

a. "it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g. United States v. Munro-Van Helms Co., Inc., 243 F. 2d 10 (5 Cir. 1957),"

b. "that taxes were withheld from employees on contributions to the Fund", and

c. "that the Fund established a separate savings account for each employee".

With respect to these distinctions:

a. *Munro-Van Helms* concerns vacation pay paid directly to the employees, with priority limited to one-fourth of the annual vacation pay, and is therefore not applicable to claims filed by trust funds.

b. This court in *Embassy Restaurant* did not concern itself with whether income taxes were withheld from employees on contributions to the Fund. Sec. 64a(2) was enacted in 1841 (c. 9, 5 Stat. 444), long prior to the laws requiring withholding of income taxes. We respectfully urge that the Congress which enacted Section 64a(2) did not intend to deprive any claims of the status of wages because the payments were owing pursuant to an arrangement made to postpone and minimize taxes. "Wages * * * due to workmen" should not be construed to read *wages due to workmen provided, however, that the United States collects some of these wages first.*

c. While the Annuity Plan did not establish a separate savings account for each of its more than 10,000 employee participants, it does substantially the same thing. The Annuity Plan sends to each participant a monthly statement setting forth the total contributions received on his behalf, together with the dividends currently added thereto. The statement sets forth each participant's total vested interest in the Annuity Plan.

2. Clearly, the question presented is of importance to millions of workmen, who work for employers which may be adjudicated bankrupt or may file Chapter XI proceedings.

Unquestionably, employees desire the security provided them by a Trust Fund which provides vested benefits. Such a Fund, however, finds it more difficult in the event of a bankruptcy to replace the contributions which the employer failed to make, than a pooled welfare fund the assets of which are transferable at the discretion of the trustees.

Urgently required, therefore, is a decision which makes clear that *Embassy Restaurant* was intended to apply only to Health and Welfare Funds and was not intended to apply to Funds providing vested rights and fixed benefits. Furthermore, with respect to those industries in which a significant number of bankruptcies may occur, the fiscal integrity of the employee trust funds will be impaired by the decision of the court below. When an ailing industry fails to pay its taxes as a result of bankruptcy, other sectors of the economy can assume the tax burden; when contributions for vested and fixed employee benefits are unpaid, the employees must suffer.

3. The decision of the court below is believed to be erroneous and an unwarranted extension of the decision of this Court in *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959).

In support of its decision, the Court below relied, among other things, upon the fact that this Court observed in *Embassy Restaurant* that welfare fund contributions "offer no support to the workman in periods of financial distress". The court below noted that "all indications are that relatively few workers whose employers become bankrupt will permanently leave the electrical industry". While it is true that only eleven of the forty employees affected therein left the electrical industry and applied for their monthly payments, it may fairly be presumed that the balance of the employees chose not to leave the electrical industry because they did not suffer financial distress by remaining a part of that industry.

In this same connection, the court below observed that "allowing a wage priority to annuity claim contributions might well reduce the amount of unpaid wages" a worker would realize from bankruptcy, and would not increase the amount of benefit immediately payable under the Plan unless his account with the Plan was empty". The court below concluded that the Annuity Fund "does not afford a 'protective cushion' against the economic dislocation caused by an employer's bankruptcy". In fact, however, no wages payable directly to the electricians were owed to the electricians employed by the bankrupt, and the likelihood that Annuity Fund claims could reduce recovery of wage claims is largely theoretical. No employer in the construction field could long continue operations without meeting his payroll regularly. Obligations to trust funds, however, like obligations to the taxing authorities, are usually substantial whenever a bankruptcy petition is filed. Annuity Fund claims, rather than wage claims, must therefore be relied upon to provide the workman with a "protective cushion".

The court below, comparing the contributions payable in *Embassy Restaurant* with those in the instant case, attempted to show a similarity between the two Funds. As this court stated, the contributions to the Welfare Fund in *Embassy Restaurant* were "flat sums of $8.00 per month for each workman * * * without relation to his hours, wages or productivity" (359 U.S. at 32). Contributions to the Annuity Fund are at a flat rate of $4.00 for each day worked. Clearly, the latter contributions are related to the time worked, while the contributions in *Embassy Restaurant* were not related to the time worked, but were related solely to the calendar. Wages of workmen are, of course, customarily based upon the time worked.

The court below also cited this court's statement in *Embassy Restaurant* that "a workman cannot even compel payment by a defaulting employer" (359 U. S. at 32), as likewise expressing a significant characteristic of the

Annuity Plan. Since *Embassy Restaurant,* however, the courts have issued numerous decisions that provide substantial protection to employees with fixed benefits and vested rights in trust funds established on their behalf. With respect to the Annuity Plan, the very fact that this case has proceeded to this stage constitutes proof that the Trustees protect the rights of the employees at least as zealously as if each employee had instituted his own action against a defaulting employer.

The court below recognized the force of the arguments in favor of a wage priority when it stated:

> "It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.,* 359 U.S. 29, 35 (1959) (Black, J., dissenting); Note. Union Retirement and Welfare Plans: Employer Contributions as 'Wages' Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957)",

but suggested that the argument be made to Congress. We respectfully urge that the aforesaid arguments apply to Funds with fixed benefits and vested rights *a fortiori.*

This Court in *Embassy Restaurant* (359 U.S. at 34, 38-39) discussed *Shropshire, Woodliff & Co.* v. *Bush,* 204 U.S. 186, and particularly the citation therein that "The [wage] priority is attached to the debt, and not to the person of the creditor.* * * ", and held that the application of this principle did not help the legal position of the Welfare Fund. We respectfully urge that the *Shropshire* principle is nevertheless applicable to the Annuity Fund herein. The Ninth Circuit in *Sulmeyer* applied the *Shropshire* principle to the Vacation and Holiday Fund therein, and stated:

> "The facts of this case bring it into closer alignment to the 'assigned wage claim' cases than to Embassy Restaurant, supra". (301 F. 2d at 77).

This court has authority to deviate from the priorities set forth in the Bankruptcy Act in the interests of justice and equity. (*Sampson* v. *Imperial Paper Corp.*, 313 U.S. 215). What principle of equity preserves the right of a speculator who purchases wage claims in quantity, or the right of a surety through subrogation (*Home Indemnity Corp.* v. *F. H. Donovan Painting Co.*, C.A. 8, 1963, 325 F. 2d 870) to enforce priority wage claims, yet denies that same right to trustees who are conserving wages pursuant to a government approved (I.R.C., Section 401) plan?

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1966.

(Argued April 11, 1967 Decided June 22, 1967.)

Docket No. 30992

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order in the Chapter XI proceeding of A & S Electric Corp., in the Eastern District of New York, George Rosling, *J.*, denying wage priority status to a claim for unpaid contributions to an Annuity Plan.

Affirmed.

WARREN C. SCHWARTZ, Brooklyn, New York, *Trustee in Bankruptcy for A & S Electric Corp.*

HAROLD STERN, New York, N. Y. (Norman Rothfeld, New York, N. Y., on the brief), *for Joint Industry Board of the Electrical Industry, appellant.*

HOWARD M. KOFF, Department of Justice, Washington, D. C. (Richard C. Pugh, Acting Assistant Attorney General, Lee A. Jackson and Joseph Kovner, Department of Justice, Washington, D. C., and Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, New York, and Frank R. Natoli, Assistant United States Attorney, Brooklyn, New York, on the brief), *for the United States.*

LUMBARD, *Chief Judge*:

The Joint Industry Board of the Electrical Industry, which administers an Annuity Plan funded by employer contributions under a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and four associations of electrical contractors in New York City, appeals from an order of Judge Rosling, affirming an order of Referee Warner in the Chapter XI proceeding of A & S Electric Corp. in the Eastern District of New York, denying priority status as "wages . . . due to workmen" under section 64a(2) of the Bankruptcy Act, 70 Stat 725 (1956), 11 U. S. C. § 104a(2), to the Joint Industry Board's claim for unpaid contributions of $5114 to the Annuity Plan. We agree with Judge Rosling that this claim must be denied a

wage priority under the Supreme Court's decision in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and we affirm his order.

The Annuity Plan of the Electrical Industry, as amended to July 1, 1964, requires each employer of workers represented by Local Union No. 3 to contribute $4.00 for each day's wages paid to each such worker. Each worker for whom such contributions are made becomes a Participant in the Plan, and he or his designated beneficiary is entitled to receive monthly payments of specified amounts, until the sums credited to his account are exhausted, upon his death, retirement from the industry at age sixty or over, permanent disability after working more than ten years for a contributing employer, or ceasing to be a Participant for any other reason. In addition, the beneficiary of a deceased Participant is entitled to death benefits out of the income of the Plan, if available, the amount varying with the length of his continuous participation in the Plan. The benefits payable under the Plan are expressly made non-assignable, and immune from attachment, garnishment, or other process. The trustees are authorized to invest and reinvest the funds of the Plan "in their sole discretion," and are made liable only for losses "due to their wilful misconduct or fraud."

Like the welfare fund contributions which the Supreme Court denied a wage priority in *United States* v. *Embassy Restaurant, Inc., supra,* contributions to the Annuity Plan "are not 'due to workmen,' nor have they the customary attributes of wages." 359 U. S. at 33. The contributions in *Embassy Restaurant* were "flat sums of $8 per month for each workman . . . without relation to his hours, wages or productivity," 359 U. S. at 32; contributions to the Annuity Plan are likewise at a flat rate of $4.00 for each day's wages. Moreover, as in *Embassy Restaurant,* the contributions are payable directly to the trustees of the Annuity Plan, who are vested with exclusive management of its funds; so far as the record shows, "a workman can-

not even compel payment by a defaulting employer." 359 U. S. at 32; cf. *Local 140 Security Fund* v. *Hack*, 242 F. 2d 375 (2 Cir.), cert. denied, 355 U.S. 833 (1957).

The Court also observed in *Embassy Restaurant* that the congressional purpose in enacting the wage priority was "to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy," and that the welfare fund contributions, which were applied to life insurance, sick benefits, and hospital and surgical plans,

> "offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery." 359 U. S. at 33-34.

The Joint Industry Board argues that the Annuity Plan does offer support to its Participants in periods of financial distress, because a worker who permanently ceases to be employed in the electrical industry ceases to be a Participant and is entitled to fixed monthly benefits. However, all indications are that relatively few workers whose employer becomes bankrupt will permanently leave the electrical industry. Moreover, the monthly benefits paid to a worker withdrawing from the electrical industry are fixed at $50.00 or (for workers leaving after January 1, 1965) $60.00 a month. Thus allowing a wage priority to Annuity Plan contributions might well reduce the amount of unpaid wages a worker could realize from bankruptcy, and would not increase the amount of benefits immediately payable under the Plan unless his account with the Plan was empty. The Annuity Plan therefore does not afford a meaningful "protective cushion" against the economic dis-

location caused by an employer's bankruptcy, and cannot be accorded a wage priority under *Embassy Restaurant.*[1]

It has been forcefully argued thta contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, *J.*, dissenting); Note, Union Retirement and Welfare Plans; Employer Contributions as "Wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant,* such an argument must be made to Congress, not to this court.

Affirmed.

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[1] The Joint Industry Board also relies on *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F. 2d 768 (9 Cir. 1962), which granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. But that decision is clearly distinguishable in any event, as it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g., *United States* v. *Munro-Van Helms Co., Inc.*, 243 F. 2d 10 (5 Cir. 1957), that taxes were withheld from employees on contributions to the Fund, and that the Fund established a separate savings account for each employee.